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No. 85-1700

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FIRST FIDELITY BANCORPORATION AND FIRST FIDELITY BANK, NATIONAL ASSOCIATION, SOUTH JERSEY,
Petitioners,

vs.

MARY LITTLE PARELL, COMMISSIONER OF BANKING OF THE STATE OF NEW JERSEY; UNITED JERSEY BANKS; UNITED JERSEY BANK/SOUTHWEST; CONSTELLATION BANCORP; THE NATIONAL STATE BANK; HORIZON BANCORP; PRINCETON BANK; NEW JERSEY NATIONAL CORPORATION; NEW JERSEY NATIONAL BANK; UNITED COUNTIES BANCORPORATION; AND UNITED COUNTIES TRUST COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is an action seeking declaratory judgment as to the interpretation of a state statute rendered moot by subsequent amendment of the legislation eliminating the provision to be interpreted?

2. May federal jurisdiction be provided by assertion of a defense of preemption of state law where the federal statutes relied upon provide no remedy for the specific harm alleged?

RULE 28.1 STATEMENT

Names of Reporting Parties:

United Jersey Banks;
United Jersey Bank/ Southwest;
Constellation Bancorp;
The National State Bank;
Horizon Bancorp;
Princeton Bank
New Jersey National Corporation;
New Jersey National Bank;
United Counties Bancorporation;
United Counties Trust Company.

United Jersey Bank/Southwest is a wholly owned subsidiary of United Jersey Banks except for director qualifying shares.

Princeton Bank is a wholly owned subsidiary of Horizon Bancorp except for director qualifying shares.

New Jersey National Bank is a wholly owned subsidiary of New Jersey National Corporation except for director qualifying shares.

United Counties Trust Company is a wholly owned subsidiary of United Counties Bancorporation except for director qualifying shares.

United Jersey Banks has the following subsidiaries which are not wholly owned:
United Jersey Bank/Franklin State
United Jersey Bank/Hillsborough National

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Relevant to this proceeding and not cited in the petition for certiorari are the following:

THE BANK HOLDING COMPANY ACT of 1956, as amended, 12 *U.S.C.* § 1846.

The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

NEW JERSEY STAT. § 17:9A-345(a) (prior to March 28, 1986)

Except as otherwise provided by sections 3 and 4 of this act,[1]

(a) No company which owns more than 25% of the stock of any bank located inside this State shall acquire ownership of more than 10% of the stock of another bank located inside this State if, at the time of such acquisition, or if, as a result of such acquisition, the company owns, or would own, more than 10% of the stock of each of two or more banks located inside this State, whose aggregate average deposits exceed 20% of the aggregate average deposits of all banks other than savings banks transacting business in this State as of the two call dates for which published figures are available next proceeding such acquisition;

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[1] § 17:9A-346, 17:9A-347.

NEW JERSEY STAT. § 17:9A-347 (prior to March 28, 1986)

Nothing in this act shall prohibit a company from acquiring bank stock in excess of the limitation imposed by section 2 of this act,[1] if such acquisition results from exchange of stock resulting from the merger or consolidation of a bank with another bank or banks.

[1] § 17:9A-345.

NEW JERSEY STAT. §17:9A-345(a) (effective March 28, 1986)

No company or person which owns more than 25% of the stock of any bank located in this State or savings bank located in this State shall acquire ownership of more than 10% of the stock of another bank located in this State or savings bank located in this State or assume the deposit liabilities of another bank located in this State or savings bank located in this State in a manner which requires the approval of a federal regulatory authority pursuant to subsection (c) of § 18 of the "Federal Deposit Insurance Act," 64 Stat. 891 (12 *U.S.C.* 1828 (c)), or subsection (d) (11) and subsection (o)(2)(o) of § 5 of the "Home Owner's Loan Act of 1933," 48 Stat. 132 (12 *U.S.C.* 1464 (d)) if, at the time of the transaction, or if, as a result of that transaction, the company or person owns, or would own, more than 10% of the stock of one or more banks located in this State or savings banks located in this State, whose aggregate average deposits exceed 12% for the first year following enactment of this 1986 amendatory and supplementary act, 13% for the second year following enactment of this 1986 amendatory and supplementary act, and 13.5%

for the third year and for the first one half of the fourth year following enactment of this 1986 amendatory and supplementary act of the aggregate average deposits of all depository institutions as of the two call dates for which published figures are available next preceding that transaction;

STATEMENT OF THE CASE

This matter concerns an action brought by various New Jersey bank holding companies and certain subsidiary banks (the bank respondents) seeking a declaration from the courts of New Jersey as to the true meaning of a New Jersey statute setting a limitation on acquisitions by bank holding companies. The sections as to which declaratory judgment was sought have, subsequent to the Third Circuit opinion in this case, been significantly amended so as to render this matter moot.

At the time this action was instituted, a New Jersey statute, *N.J.S.A.* 17:9A-345(a), provided that no holding company could increase its holdings to include banks with more than 20% of commercial banking deposits throughout the State of New Jersey by means of an acquisition of another, previously unowned bank. However, that limitation was expressly made subject to an exception for acquisitions by merger. The bank respondents, believing that the merger exception was an inadvertent relic of a prior statutory scheme from a time when statewide bank holding companies in New Jersey were forbidden, sought a declaration in the Superior Court of New Jersey that the merger exception must be deemed repealed by implication in that its existence made the 20% deposit cap meaningless.

The event which triggered the filing of the Superior Court complaint was the proposed merger between First Fidelity Bank, National Association, South Jersey (FFBSJ) and National Bank and Trust Company of Gloucester County (hereafter Gloucester County), both of them national banking associations. FFBSJ is a wholly owned subsidiary of First Fidelity Bancorporation (hereafter First Fidelity) which, with the acquisition of Gloucester County, would have owned banks in New Jersey which together had more than 20% of commercial bank deposits thereby violating the cap set in *N.J.S.A.* 17:9A-345(a). Because the acquisition was by merger, if the exception to the cap was viable, then First Fidelity would not be in violation of the law. The bank respondents believed, and continue to believe, that it was never the legislative intent to have an exception swallowing the rule and therefore sought the declaratory judgment that the merger exception was repealed.

A second cause of action alleged that the acquisition of Gloucester County would result in a violation of the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1 et seq.

The proposed merger between FFBSJ and Gloucester County was submitted to the United States Comptroller of the Currency pursuant to the Bank Merger Act, 12 *U.S.C.* § 1828(c). It has never been contended that it was anything but the appropriate route to follow for required federal approval of the merger in that two national banking associations were involved. The bank respondents have taken the position throughout this case that whatever ruling was handed down by the Comptroller, because the surviving bank, FFBSJ, was a wholly owned subsidiary of a bank holding company, First Fidelity, this was a transac-

tion also subject to the New Jersey 20% limitation on bank holding companies. While this matter was pending in the Third Circuit, the Comptroller approved the merger which was then effectuated after the statutory thirty day waiting period. At that point, First Fidelity apprised the Third Circuit of this fact and raised the claim that the case was moot because of the Comptroller's approval, which argument was resisted by the bank respondents. Because the Third Circuit ultimately concluded that jurisdiction never existed in the federal courts, it declined to reach the mootness claim raised by First Fidelity. (783 F.2d at 370, n.12.)

The arguments presented by First Fidelity below were essentially the same as those advanced now in the petition for certiorari. Because the merger was subject to the Comptroller's review, First Fidelity asserted that this whole action is really one under the Bank Merger Act even though that statute itself provides that no action could be brought in Federal District Court until after the Comptroller has issued a ruling on the merger application. 12 *U.S.C.* § 1828(c)(7)(A). The argument was made that the standards to be utilized by the Comptroller as set forth in that statute displace any other standard of review that could be applied to such a merger. The Third Circuit found no merit to that assertion, finding that at most First Fidelity was asserting federal preemption which, as a defense, is not a basis for federal jurisdiction. 783 *F.* 2d at 368. As a result, the Third Circuit ordered a remand to the Superior Court of New Jersey. An application for rehearing or rehearing *en banc* was denied (21a) but issuance of

the judgment in lieu of mandate was stayed to allow time for the filing of a petition for certiorari (22a).

Subsequent to the Third Circuit opinion in this matter, there was signed into law by New Jersey Governor Kean a bill amending the New Jersey banking legislation which is the subject matter of this litigation. The deposit cap appearing in *N.J.S.A.* 17:9A-345 has been changed so that it now deals with a universe including not only commercial banks but also thrift institutions (savings banks and savings and loans) so that there is no question that First Fidelity's holdings, even including Gloucester County, are within the current statutory limitation. Moreover, the previously existing exception for acquisitions by merger, *N.J.S.A.* 17:9A-347, which was key to the controversy causing the complaint to be filed, has been repealed.

SUMMARY OF THE ARGUMENT

At this point in time, the bank respondents contend that the litigation has been rendered moot by the amendments to the New Jersey legislation occurring after the Third Circuit opinion. The provisions as to which declaratory judgment was initially sought in New Jersey Superior Court have been altered so that there is in fact no live controversy remaining. In particular, the provision as to which a declaration was sought that there had been repeal by implication, has now been expressly repealed by the legislature.

If this Court were to conclude that the matter is not moot, then it is the bank respondents' contention that the Third Circuit correctly decided that there was no federal jurisdiction based upon the clear precedent of this Court's decision in *Franchise Tax Board of the State of California vs. Construction Laborers*

Vacation Trust for Southern California, 463 *U.S.* 1,103 *S. Ct.* 2841, 77 *L. Ed.* 2d 420 (1983). The federal legislation relied upon by First Fidelity, even if its arguments are accepted, would do no more than prevent the State of New Jersey, and other states with similar deposit cap limitations on holding company acquisitions, from enforcing those limitations by virtue of their being preempted by federal standards for bank mergers. Preemption as a defense is not a basis of federal jurisdiction sustaining removal of a state court action presenting solely state claims. The one recognized exception to this doctrine under the decision in *Avco Corp. vs. Aero Lodge 735,* 390 *U. S.* 557,88 *S. Ct.* 1235, 20 *L. Ed.* 2d 126 (1968) requires that some substitute federal cause of action be provided. There is no federal cause of action under which a party could seek to enforce a state limitation on deposits, so *Avco* is inapplicable.

POINT ONE

THE AMENDMENT OF THE NEW JERSEY STATUTORY PROVISIONS AS TO WHICH DECLARATORY JUDGMENT WAS SOUGHT RENDERS THIS CASE MOOT.

This lawsuit was filed to seek adjudication from New Jersey courts as to the proper interpretation of a particular state statute. That statute has now been amended, substantially changing the provisions at issue so that there is no longer any point to interpreting the old law.

At the time this suit was instituted, New Jersey had a 20% deposit cap for commercial banking as a limit beyond which holding companies could not go through acquisition as opposed to internal growth. There was also a stated exception for acquisition by

merger. Now the statute has been amended so that the limitation has been changed to one on deposits of not only commercial banks but also so-called thrift institutions, which include savings banks and savings and loan associations. Furthermore, the merger exception has been repealed. There is no question but that the acquisition of Gloucester County through merger with FFBSJ, which was the triggering event for the lawsuit, does not put First Fidelity over the new limit established by the New Jersey legislature. Therefore, any attempt to determine the meaning of the former New Jersey provision would be a meaningless exercise.

The law is well settled that a case is moot " 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *United State Parole Commission vs. Geraghty,* 445 *U.S.* 388, 396, 100 *S. Ct.* 1202, 1208, 63 L. Ed. 2d 479 (1980), quoting *Powell v. McCormack,* 395 *U.S.* 486, 496, 89 *S. Ct.* 1944, 1951, 23 *L. Ed.* 2d 491 (1969).

Decisions involving interpretation of legislation leave no doubt that this case is indeed moot. For example, various circuits all considered a statutory formula for distribution of highway funds. *Vermont vs. Goldschmidt,* 638 *F.* 2d 482 (2d Cir. 1980); *New Mexico vs. Goldschmidt,* 629 *F.* 2d 665 (10th Cir. 1980); *Arkansas vs. Goldschmidt,* 627 *F.* 2d 839 (8th Cir. 1980). During the course of these lawsuits in which the respective states were seeking enforcement of an existing formula, Congress passed new legislation controlling the obligation of funds not already committed before the new statute's effective date. All three circuits concluded that the new statute rendered

moot claims for money allegedly due pursuant to the previous law. Because the new law was a complete substitution for what existed at the time of the district court decision, the controversy was moot. *Arkansas vs. Goldschmidt,* 627 *F.* 2d at 842.

In *Defenders of Wildlife vs. Endangered Species Scientific Authority,* 725 *F.* 2d 726 (D.C. Cir. 1984) a challenge was brought to standards used to control the export of bobcats. An injunction was issued in the district court for failure to take into account the bobcat population as an element of establishing the quota. After the injunction issued, the Endangered Species Act Amendments of 1982 were signed, specifically providing that there was no requirement to make population estimates. The district court found that this removed its basis for jurisdiction and vacated the injunction. Affirming that action, the circuit court said:

> We agree with the district court's dismissal of this action. Congress, through the amendments to the Endangered Species Act, has announced a new standard for the federal defendant to follow. Thus, plaintiff's challenge to the prior guidelines as violative of the old *Defenders I* standard is now moot. 725 *F.* 2d at 731

To the extent that First Fidelity is asserting any inconsistency between the federal and state law in banking, in such an instance when the state law in question has been amended so as to eliminate the inconsistency, the case is moot. *Monahan vs. Nebraska,* 687 *F.* 2d 1164 (8th Cir. 1982), cert. den. 103 *S. Ct.* 1252. Where the plaintiffs' stake in the liti-

gation has been removed by an intervening statute, there are simply no grounds for continuing. *Boston NAACP vs. Beecher,* 716 *F.* 2d 931 (1st Cir. 1983). Here, the plaintiffs' interest in having the merger exception to the 20% limitation repealed by implication has been eliminated by the fact that the legislature has now expressly repealed that exception and further changed the structure of the deposit cap so that it cannot now be maintained that the First Fidelity acquisition leaves it in violation of § 345(a).

Similarly, the second cause of action set forth in the complaint is also moot. The bank respondents' theory of a violation of the New Jersey Antitrust Act was that exceeding the 20% cap itself amounted to an action tending to create a monopoly position in New Jersey commercial banking. Because First Fidelity is now not in violation of the statewide cap, the bank respondents no longer assert that there is viability to the antitrust claim.

First Fidelity is certainly well aware of the change in New Jersey law, which was signed prior to the filing of the petition for certiorari. The bank respondents are at a loss to see any reason why First Fidelity is attempting to proceed with this case when it is apparent that no point is to be served by interpreting provisions which are no longer of any effect. There has never been any request for monetary damages and the basis for any injunctive relief initially sought obviously is no longer sustainable in the absence of the previous deposit limitation. Therefore, this Court should have no hesitation in finding the entire matter to be moot.

POINT TWO

NO FEDERAL CLAIM HAVING EVER BEEN ASSERTED BY THE PLAINTIFFS IN THIS CASE, AND THERE BEING NO FEDERAL REMEDY FOR THE PARTICULAR CAUSE OF ACTION ASSERTED, THE THIRD CIRCUIT CORRECTLY DECIDED THAT REMOVAL WAS IMPROVIDENT.

The law is well settled beyond dispute that the defense of preemption does not provide federal jurisdiction. The facts of this case provide no basis for application of the limited exception to that rule, so the remand order below was entirely appropriate.

As noted by this Court in its decision in *Franchise Tax Board,* there is a long line of Supreme Court decisions establishing that the existence of federal jurisdiction must be determined from the face of the complaint without regard to defenses. *Gully vs. First National Bank,* 299 *U.S.* 109, 57 *S. Ct.* 96, 81 *L. Ed.* 70 (1936); *Louisville and Nashville Railroad Co. vs. Mottley,* 211 *U. S.* 149, 29 *S. Ct.* 42, 53 *L. Ed.* 126 (1908); *Tennessee vs. Union and Planters' Bank,* 152 *U. S.* 454, 14 *S. Ct.* 654, 38 *L. Ed.* 511 (1894).

In the *Franchise Tax Board* decision the Court made it clear that where there is a claim of preemption of state law by a federal statute, federal jurisdiction is thereby provided if, and only if, the particular cause of action asserted under state law has been replaced by a concomitant federal claim under the preempting statute. For example, in *Franchise Tax Board,* the State as plaintiff was seeking to enforce a tax levy. That was not one of the particular causes of action created by the Employees Retirement Income Security Act (ERISA). Therefore, even though it was held that ERISA might preclude

enforcement of the tax levy, it did not give the State the right to seek the same relief. It was noted that a different result might pertain were the claim under state law one which could be maintained under ERISA. See 103 *S. Ct.* at 2854-2855. This was analogized to the situation in the *Avco* case where it was held that the force of § 301 of the Labor Management Relations Act was to not only displace state causes of action but to replace them with a federal one. See *Franchise Tax Board,* 103 *S. Ct.* at 2853-2854.

The only argument advanced by First Fidelity along these lines is that the bank respondents had a remedy in a challenge to the Comptroller's approval of the merger between FFBSJ and Gloucester County under the Bank Merger Act. However, First Fidelity's own exposition on the statutory scheme under the Bank Merger Act defeats its claim. There is no dispute that said statute provides a specific set of standards to be utilized, appearing at 12 *U.S.C.* § 1828(c)(5). Cases cited by First Fidelity, as to which the Third Circuit opinion in this case is allegedly inconsistent, do indeed hold that the appropriate federal administrative agent, be it the Comptroller, the Federal Reserve Board, or Federal Deposit Insurance Corp., is limited in its review of proposed mergers to those standards and may not go outside them. *County National Bank vs. Board of Governors,* 654 *F.* 2d 1253 (8th Cir. 1981); *Washington Mutual Savings Bank vs. FDIC,* 482 *F.* 2d 459 (9th Cir. 1973). The whole point is that the causes of action asserted here were totally distinct from any opposition to this merger under the Bank Merger Act or any other federal statute. Had the bank respondents chosen to file an action in federal district court challenging the Comptroller's approval of the

merger, then certainly that case would have to have been adjudicated based upon the Bank Merger Act standards which, as First Fidelity argues, are meant to be those of the Sherman and Clayton Acts apart from the one broadening to allow the consideration of anti-competitive effects being outweighed in the public interest as set forth in § 1828(c)(5)(B). No such lawsuit was filed. Rather, the bank respondents chose to pursue a purely state remedy based upon a limitation created by the New Jersey legislature, of no force or effect outside of New Jersey.

The issue then resolves itself as to whether or not New Jersey was precluded from having any limitation on deposits controlled by a single bank holding company. The Bank Merger Act does not address the question of bank holding companies, and is irrelevant to deciding this point.

The federal statue that should be looked at is the Bank Holding Company Act, 12 *U.S.C.* § 1841 et seq. It does provide for Federal Reserve review of acquisitions by bank holding companies or subsidiaries. Furthermore, it is true that the same standards applied under the Bank Merger Act are also part of the Bank Holding Company Act. 12 *U.S.C.* § 1842(c). However, that statute also provides in no uncertain terms that nothing therein prevents any state from exercising jurisdiction over bank holding companies and their subsidiaries. 12 *U.S.C.* § 1846. It has been held that this section leaves a state free to totally bar the formation of bank holding companies within its borders. *Commercial National Bank of Little Rock vs. Board of Governors,* 451 *F.* 2d 86 (8th Cir. 1971). This Court found no substantial federal question to review when the West Virginia Supreme Court upheld

a statue preventing a holding company from owning 25% or more of the shares of each or two or more banks, including national banking associations, and required the defendant to divest itself of such ownership interest as necessary to comply with the statute. *Security National Bank and Trust Co. vs. First West Virginia Bancorp Inc.*, 277 *S.E.* 2d 613 (W.Va. 1981), appeal dismissed, 454 *U.S.* 1131, 102 *S. Ct.* 986, 71 *L. Ed.* 2d 284.

First Fidelity asserts that because the standard to be utilized by federal agencies is also for use in any judicial proceedings challenging their determinations, the same standard filters down to state law such as the New Jersey deposit cap. Yet nothing in the numerous piecemeal quotes from the legislative history, appearing at pages 15 - 17 in the petition for certiorari, gives the slightest indication that Congress was addressing anything other than actions filed to challenge decisions of the Comptroller, the Federal Reserve Board or the Federal Deposit Insurance Corp. There is no sign that Congress even considered state laws governing holding companies.

It is readily apparent that by preserving the states' right to legislate regarding bank holding companies and their subsidiaries, Congress was leaving the way open for differing requirements in the various states. Therefore, it is simply not tenable to claim that the Bank Merger Act in anyway was intended to encompass consideration of a deposit cap which might be enacted in one state and not in another.[1]

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[1] Nine states currently have specific percentage limitations similar to that of New Jersey, while four other states require their respective banking authorities to review proposed bank

This Court has expressly held in the past with regard to § 1846:

> This section was intended to preserve existing state regulations of bank holding companies, even if they were more restrictive than federal law. *Lewis v. B. T. Investment Managers Inc.*, 447 *U.S.* 27, 48-49, 100 *S. Ct.* 2009, 2022, 64 *L. Ed.* 2d 702 (1980).

More recently, the legality of state legislation by which New England states opened their borders to bank holding companies from certain other states while barring those from others not part of a regional

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holding company acquisitions with an eye toward preventing possible monopoly positions. The states having percentage limitations are, in alphabetical order, Arkansas (Ark. Stat. § 67-2112, setting a limit of twelve percent of deposits): Indiana (Ind. Code § 28-2-13(19)(e) setting a 10% limit until July 1, 1986, an 11% limit until July 1, 1987 and 12% thereafter); Iowa (Iowa Code § 524.1802, setting an 8% deposit limit); Kentucky (Ky. Rev. Stat. § 287.900, setting a 15% deposit limit); Missouri (Mo. Rev. State. § 362.915, setting a 13% deposit limit); Nebraska (Reissued Rev. State. of Neb. § 8-903, setting a 9% deposit limit); New Hampshire (N.H.Rev. Stat. § 384-B:3 setting a 15% deposit limit); Oklahoma (6 Okla. Stat. § 502 setting an 11% deposit limit); Tennessee (Tenn. Code § 45-2-1405, setting a 16 1/2% deposit limit). Four other states, while not setting specific deposit limitations, do require their respective banking authorities to review all proposed bank holding company acquisitions with an eye toward preventing any possible monopoly position. These states are: Georgia [Ga. Code § 7-1-606(b)(1) forbiding approval if there would be a monopoly or a tendency to create one]; Nevada [Nev. Rev. Stat. § 666.125(3)(c) requiring review of the effect on competition in banking]; South Carolina (Code of Laws of S.C. § 34-24-50, an acquisition cannot be approved if it will establish a monopoly, effective July 1, 1986); West Virginia [W. Va. Code § 31A-8A-4(c)(1). placing limits on acquisitions if they are monopolistic].

compact was upheld in *Northeast Bancorp v. Board of Governors*, ___*U.S.* ___, 105 *S. Ct.* 2545 (1985). Due note was taken of the statement in the *B. T. Investment* case that banking is a matter of profound local concern. To the extent that this Court in *B. T. Investment* indicated that legislation could not be passed nullifying the federal statute, the reference was to interstate activities of bank holding companies as to which the commerce clause bars state legislation except to the extent permitted by the federal act. This case involves purely intra-state banking and so the limitation on state action addressed in *B. T. Investment* is inapplicable here.

The prime failing of First Fidelity is in refusing to recognize that there is a difference between review of the underlying merger between FFBSJ and Gloucester County and regulation of the statewide activities of the parent holding company. The antitrust standards relied upon by First Fidelity as being exclusive go only to the merger. Even in the context of the Federal Bank Holding Company Act it is clear that those same standards are to be utilized only in determining whether or not a particular acquisition should be approved. The focus of this case has been not the underlying merger but rather whether First Fidelity would be violating the statewide deposit cap, and in so doing also be in violation of the New Jersey Antitrust Act. The merger itself was important only in that it was the final step putting First Fidelity over the 20% limit.

It may well be that one remedial action sought in the prayer for relief in the complaint, namely setting aside of the merger between FFBSJ and Gloucester County, would have been inappropriate. The correct

injunction would be one similar to that approved by the West Virginia Supreme Court in the *Security National Bank* case, namely requiring divestiture sufficient to bring the defendant bank holding company into compliance with the state statutory limits on stock ownership. Thus, First Fidelity might have been ordered to divest itself of ownership interests sufficient to limit its holdings to less than 20% of New Jersey commercial banking deposits. That would not necessarily have to have been done in the context of the merger between FFBSJ and Gloucester County.

This same notion renders meaningless the entire dissertation in the petition for certiorari regarding the supremacy of federal law as to national banks (petition at pages 22-25). Much of the case law there cited is limited to a specific provision of federal law regarding the branch banking activities of national banks, which by its own terms provides that the federal law is determined by the content of state law. In particular, the Banking Act of 1933 provides that the Comptroller may approve the establishment and operation of a branch only when such establishment or operation is affirmatively authorized to state banks by state law. 12 *U.S.C.* § 36(c). Therefore, determination of the authority granted by state law on the face of the statute becomes a federal question in the context of a decision by the Comptroller pursuant to said § 36(c). See *Howell v. Citizens First National Bank of Ridgewood*, 385 *F.* 2d 528, 530 (3rd Cir. 1967). That is a far cry from the Bank Holding Company Act expressly providing that notwithstanding anything in the federal statute, state law is not preempted.

The jurisdiction of the Comptroller over the merger was, unquestionably, properly invoked. Nonetheless,

that does not mean it was exclusive. As the Third Circuit has had recent occasion to hold, the jurisdiction of more than a single reviewing entity may be called into play as to a particular transaction. Thus, in *Girard Bank v. Board of Governors,* 748 *F.* 2d 838 (3rd Cir. 1984) it was found that both the Comptroller and the Federal Reserve had to approve the transaction there at issue. Under the same principle, the Comptroller's jurisdiction did not require that the state law governing bank holding companies be disregarded.

As the Third Circuit correctly observed, the basis for the district court finding of federal jurisdiction in this case was the "artful pleading" doctrine as reflected by *Federated Department Stores Inc. v. Moitie,* 452 *U.S.* 395, 101 *S. Ct.* 2424, 69 *L. Ed.* 2d 103 (1980). Its analysis of the application of artful pleading to this case was apt in recognizing that unless it is applied "with circumscription" it may be an exception that swallows the rule. 783 *F.* 2d at 368. Moreover, the Third Circuit was just as correct in finding that notwithstanding the district court's disclaimer of reliance on federal preemption, "that was the practical effect of its holding." *Ibid.*

The decision below rested on well settled principles of law that have been upheld by this Court in numerous decisions throughout this entire century to the effect that federal preemption as a defense does not provide federal jurisdiction. Taking this together with the unequivocal congressional preservation of state law relating to bank holding companies, there is simply no basis for finding the Third Circuit to have erred.

CONCLUSION

For the foregoing reasons this matter should be declared moot, or alternatively the petition for a writ of certiorari should be denied.

Respectfully submitted,

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